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The Inter-American System of Human Rights: Challenges for the Future

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INTRODUCTION[1]

The Inter-American system is a combination of human rights norms and supervisory institutions within the Americas. The applicable rules consist primarily of the American Declaration on the Rights and Duties of Man[2] ("American Declaration") and the American Convention on Human Rights[3] ("American Convention"). The institutions involved are the organs responsible for supervising compliance with the established rules: the Inter-American Commission on Human Rights[4] ("the Commission") and the Inter-American Court of Human Rights[5] ("the Court"). The system performs supervisory functions basically through country reports adopted by the Commission which describe the overall human rights situation in a country and decisions in individual petitions alleging that internationally protected rights have been violated. Individuals have standing to file petitions only with the Commission, and not the Court. Only the former organ may decide to bring cases to the Court concerning States that have accepted the Court's compulsory jurisdiction, if such State fails to comply within three months with the Commission's recommendations in the underlying case.[6] The political organs of the Organization of American States

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1. This piece is an expanded and revised version of the Josephine Onoh Lecture given by the author at the University of Hull Law School in November 2007.

2. Organization of American States Official Res., Adopted by the Ninth International Conference of American States, OEA/ser.L./V./II.23, doc. 21 rev. 6 (1948), *available at* http://cidh.org/Basicos/English/Basic2.American%20Declaration.htm.

3. Nov. 22, 1969, 1144 U.N.T.S. 143 [hereinafter American Convention].

4. Inter-Am. C.H.R., Annual Report 1998, OEA/ser.L./V./II.102, doc. 6 rev. (1998) at ch. I, *available at* http://www.cidh. oas.org/annualrep/98eng/Table%20of%20Contents.htm.

5. The Secretary General, *Annual Report of the Secretary General 1999–2000*, at ch. III, *available at* http://www.cidi.oas.org/annualreport00-e/annualreport99-00-3.htm.

6. For a description of the Inter-American system, *see* Claudio Grossman, *The Velásquez Rodríguez Case: The Development of the Inter-American Human Rights System, in* INTERNATIONAL LAW STORIES 81–84 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., Foundation Press 2007). The petition system has not always been the favored or the most efficient means to address human rights violations in the hemisphere. The Commission had resorted to country reports, some following visits *in loco* to the OAS member states, geared towards mobilizing public opinion, particularly in cases of massive and systematic violations. With the evolution of the political situation of the hemisphere and a dramatic decrease in violations of political rights, the petition system (cases) became the main vehicle for addressing human rights violations. States in the process of democratic transition generally participated in the proceedings. The petition system was adopted as the predominant means to enhance the protection of human rights and develop uniform and cohesive standards, while decreasing

("OAS")—the Permanent Council and the General Assembly—also share in the responsibility of guaranteeing compliance with the American Declaration and Convention, as well as with the decisions of the Commission and the Court.[7]

The Inter-American system has progressed through several phases in its development. Three main phases can be identified, although they are not absolutely distinct or separate. During its early years, until roughly the 1980s, the system dealt with dictatorial regimes characterized by mass and gross violations of human rights. Examples of decisions adopted to confront those violations include the first three contested cases decided by the Inter-American Court dealing with forced disappearances in Honduras.[8] A second phase is characterized by the rise of democracies in the hemisphere, as well as attempts to analyze and review the legacies of dictatorial regimes. The Commission and the Court confronted issues including impunity, freedom of expression, and due process, and developed States' obligations under Articles 1.1 and 2 of the American Convention such as duties to investigate and punish those allegedly responsible for human rights violations, and to conform States' domestic legislation to the American Convention. In addition, the adoption of the Inter-American Democratic Charter at the XXVIII Special Session of the OAS General Assembly on September 11, 2001, acknowledged and emphasized the hemisphere's new political reality. This Charter establishes the right to democracy and condemns member states that abandon this principle. It also strengthens the relationship between democracy and human rights, stating that respect for human rights is an essential element of democracy. This development contributed to the consolidation of the system's legitimacy as a promoter of democracy and fundamental rights and freedoms in the hemisphere.

A third phase, the one in which we live, presents the system with issues of inequality and exclusion, such as poverty. The Western Hemisphere has the most inequitable distribution of wealth in the world. Equally conspiring against democratic values is the situation of vulnerable groups, such as indigenous peoples, women, minorities, and children, who do not fully enjoy human rights. These issues have historically provided, and currently provide, pretexts for authoritarian regimes of different types to present ideological alternatives to democracy and human rights as reflected in the Inter-American system.

The Commission and Court's case law has been significant in advancing the protection of fundamental rights and contributing to such protections throughout the different phases of the system's development. This article describes and analyzes three cases that illustrate the three phases of the Inter-American system's development, provide elements to better understand that system, and assist in analyzing and evaluating its future. More specifically, this article examines the cases of *Velásquez Rodríguez v. Honduras* (1988), analyzing mass and gross violations of human rights involving forced disappearances in the context of authoritarianism and dictatorships;

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reliance on, but not entirely abandoning, the other mechanisms already in place.

7. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 19 U.N.T.S. 3.

8. Fairen Garbi and Solis Corrales v. Honduras, 1989 Inter-Am. Ct. H.R. (ser. C) No. 6 (March 15, 1989); Godínez Cruz v. Honduras, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5 (January 20, 1989); Velásquez Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

Barrios Altos v. Peru (2001),[9] addressing the legacy of dictatorships, particularly with regard to impunity; and *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001),[10] examining the rights of indigenous peoples, and in a broader sense, the status of vulnerable groups and the need to expand and strengthen democracy through their inclusion. The overall purpose of this article is to analyze the Inter-American system of human rights and identify key challenges for the future.

I. THE CASE OF ANGEL MANFREDO VELÁSQUEZ RODRÍGUEZ

Angel Manfredo Velásquez Rodríguez disappeared on September 12, 1981, in downtown Tegucigalpa, Honduras. His friends and family never saw him again, the Honduran government denied any knowledge or involvement in his disappearance, and the Honduran courts would not hear the family's case.[11]

The petition in the *Velásquez Rodriguez* case was filed with the Commission in October 1981,[12] alleging that the Honduran government was responsible for Manfredo Velásquez's disappearance.[13] Disappearances constitute one of the most egregious violations of human rights because they are perpetrated by State authorities who later deny any knowledge or involvement in the situation. For Manfredo Velásquez's family, along with the families of many other victims, disappearances were a grim political and legal reality in Latin America during the 1970s and 1980s.

The government of Honduras failed to provide the Commission with evidence and information about the disappearance.[14] Honduras's lack of cooperation left the Commission with no option but to presume the validity of the facts as alleged by the petitioner,[15] a presumption provided for at that time in Article 42 of the Commission's Rules of Procedure.[16] The Commission's report on the merits indicated that Manfredo

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9. Barrios Altos v. Peru, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

10. Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

11. For a more extensive analysis of the case, see Claudio Grossman, *The Velásquez Rodríguez Case: The Development of the Inter-American Human Rights System, in* INTERNATIONAL LAW STORIES chapter 3 (Foundation Press 2007).

12. *See* Velásquez Rodríguez v. Honduras, Case 7920, Inter-Am. C.H.R., Report No. 22/86, OEA/Ser.L./III.15, doc.13 (1986) (reporting that the Commission received the petition on October 7, 1981, and stating that the petition maintained that Manfredo Velásquez was in the First Battalion of Infantry in Tegucigalpa along with other missing political prisoners).

13. *See id.* at ¶ 1 (reporting that the petition stated that "[w]e assign responsibility for that action to Colonels Leonidas Torres Arias (G-2), Gustavo Alvarez (FUSEP), Juan Lopez Grijalba (National Investigation Department) and Hubbert Bodden (Commander, First Battalion of Infantry, Tegucigalpa)").

14. *See id.* at ¶¶ 4–6 (indicating that the Commission did not receive the requested information from the Honduran government despite requests sent on October 14, 1981, November 24, 1981, October 6, 1982, March 23, 1983, and August 9, 1983).

15. *See id.* at art. 39.

16. *See* Inter-Am. Ct. H.R., 2001 Rules of Procedure [hereinafter Court's Rules of Procedure] (approved by the Commission in 2000, and amended in 2002 and 2003) ("The facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these

Velásquez had been detained and most likely disappeared because of state agents in Honduras, and that his disappearance violated the right to life (Article 4) and the right to personal liberty (Article 7) of the American Convention.[17] The Commission recommended investigation and punishment of those guilty as well as reparations.

In 1985, after General Alvarez, the military strongman of Honduras, was ousted from power, the new government of Honduras requested additional time to conduct an internal investigation.[18] However, the investigation concluded with a four-sentence report stating that there was no evidence connecting anyone in the military to the disappearance.[19] Consequently, in April 1986, the Commission affirmed its earlier recommendation in its entirety and referred the case to Court.[20]

A. The Decision

The American Convention does not explicitly criminalize disappearances. Nonetheless, the Court ruled that forced disappearances constitute multiple and continuous violations of the rights enshrined in the Convention.[21] The Court concluded that the practice of disappearances violated four articles of the American Convention, specifically Articles 1 (duty to guarantee), 4 (right to life), 5 (right to personal integrity), and 7 (right to personal liberty). "The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognizes the right to personal liberty."[22] The Court interpreted Article 5's provisions regarding cruel, inhuman and degrading treatment, concluding that they prohibit incommunicado detention.[23] It also found that prolonged and isolated imprisonment harms the "psychological and moral integrity of the person."[24] Finally, the Court acknowledged that disappearances involving clandestine executions without trials and clandestine burials violated the right to life under Article 4.[25] The Court characterized the practice of disappearances as violating even more than the specific articles of the Convention, stating that "[t]he practice of disappearances ... shows a crass abandonment of the

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Rules of Procedure, as long as other evidence does not lead to a different conclusion.").

17. *See* Velásquez Rodríguez v. Honduras, Case 7920, Inter-Am. C.H.R., Report No. 22/86, OEA/Ser.L/V/II.61, doc. 44 (1986).

18. *See id.* at ¶ 16 (relating that Honduras requested postponement of consideration of the case in its Cablegram of March 1, 1985 and that it stated that it had set up an Investigating Commission to examine the complaints and identify and punish those responsible).

19. *See* Claudio Grossman, *Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation*, 15 HASTINGS INT'L & COMP. L. REV. 363, 368–69 (1991–1992).

20. *See* Regs. of the Inter-Am. C.H.R., OEA/Ser.L.V/II.82 doc.6 rev. ¶ 1 (1992), at art. 50; American Convention, *supra* note 3, art 63(1).

21. Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

22. *See id* at ¶ 155.

23. *Id.* at ¶ 156 (stating that "prolonged isolation and deprivation of communication are in themselves cruel and inhumane treatment, harmful to the psychological and moral integrity of the person").

24. *Id.*; American Convention, *supra* note 3, at art. 5.

25. Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, at ¶ 157 (July 29, 1988).

values which emanate from the concept of human dignity and of the most basic principals of the Inter-American system and the Convention."[26]

The *Velásquez Rodríguez* decision, in the context of other domestic and international factors such as the end of the Cold War and the easing of tensions in the region, contributed to the end of the systemic state practices of disappearances. The case challenged the pervasive culture of impunity and deniability in countries in the region. It was the first contentious case decided by an international tribunal to declare the practice of forced disappearances illegal. By exposing the State's responsibility for this inhuman practice and rejecting a status quo characterized by repression and authoritarianism, the case helped further the goals of human rights and democracy in the region.

B. The Importance of the Velásquez Rodríguez Case for the International Community and Court

Prior to the Court's decision in *Velásquez Rodríguez*, international and regional bodies responded to disappearances in general terms, issuing resolutions and creating working groups to address this practice.[27] For example, the United Nations General Assembly adopted resolutions condemning forced disappearances. The United Nations Commission on Human Rights created the Working Group on Enforced and Involuntary Disappearances to assist families in determining the fate of their relatives and to establish channels of communication between the families and the governments.[28] The Inter-American Commission had previously condemned the practice and urged that it be investigated and stopped.[29] The OAS General Assembly characterized the crime of disappearances as "an affront to the consciousness of the hemisphere" and a crime against humanity.[30] Still, most human rights instruments created before the decision did not address disappearances as a specific violation.

Since the *Velásquez Rodríguez* decision, the crime of disappearances has been codified, both regionally and internationally. The Inter-American Convention on the Forced Disappearance of Persons (which incorporates the definition of disappearances used in the *Velásquez Rodríguez* case and also encompasses the crimes of kidnapping, torture, and murder) was passed in 1994 and entered into force in 1996.[31] The *Velásquez Rodríguez* decision was the impetus for drafting and passing the Convention.[32] It also contributed to the inclusion of disappearances in the Rome

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26. *Id.* at ¶ 158.

27. *See* Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, at ¶¶ 151–153 (July 29, 1988).

28. *See* Juan E. Mendez & Jose Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507, 514–15 (1990).

29. *See, e.g.*, Inter-Am. C.H.R. Report on Argentina, OEA/Ser.L/V./II/49, doc. 19, rev. ¶ 1 (1980); Inter-Am. C.H.R. Report on Chile, OEA/Ser.L/V/II.66, doc. 17 (1985).

30. *See* OAS G.A. Res. 666 (XIII-0/83) (Nov. 18, 1983); OAS G.A. Res. 742 (XIV-0/84) (Nov. 17, 1984).

31. *See* Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, OAS/Ser. P AG/doc. 3114/94 rev.1 (*entered into force* Mar. 28, 1996).

32. Current signotaries to the Convention are the following: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama,

Statute of the International Criminal Court (ICC)[33] and the International Convention against Disappearances.[34] The Rome Statute defines forced disappearances as a crime against humanity (a grave violation of human rights and fundamental liberties) that is subject to the jurisdiction of the International Criminal Court. [35] These developments at the regional and international level have made forced disappearances an international crime, further strengthening a normative framework that condemns and punishes this type of inhumane behavior.

Because this instance was the first contentious case decided by the Court, it presented the Commission and the Court with many novel legal issues. The Court had yet to determine the type of court it would be, let alone to decide the level and type of proof required, the responsibilities of the petitioners or the nature of State responsibility or reparations. The Court also had to render a fair decision, balancing the needs of the petitioners with the need to retain the participation of the Honduran state in the proceedings.

Despite the prior proceedings at the Commission, the Court in this case established itself as a court of first instance, practically trying the case de novo.[36] This may now seem a procedural hardship since it eliminated the need for States to cooperate with the Commission's proceedings as everything had to be proven anew. At that time, however, the Court as well as the Commission and the victim's lawyers, had both political and legal reasons to "retry" the case because: 1) the Honduran government had failed to fully participate in the proceedings before the Commission, leading that organ to determine Honduras's responsibility on a procedural presumption which accepted the validity of uncontested facts alleged in the petition;[37] and 2) the lawyers in this case wanted the Court to unequivocally establish the government's responsibility for the disappearances in open and contested judicial proceedings, thereby contributing to exposing the crimes of disappearances to public opinion.

In reviewing the case, the Court in *Velásquez Rodríguez* faced two relevant issues that would have significant importance throughout its development. First, the Court defined which local remedies victims would be required to exhaust before bringing their cases to an international tribunal. The Court stated that victims needed to pursue all local procedures that could potentially and realistically achieve the goal sought.[38] In

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Paraguay, Peru, Uruguay, and Venezuela.

33. Rome Statute of the International Criminal Court, art. 7(2)(i), July 17, 1998, 2187 U.N.T.S. 90.

34. International Convention for the Protection of All Persons from Enforced Disappearance, December 20, 2006, 14 IHRR 582.

35. *See* Rome Statute of the International Criminal Court, art. 7(2)(i), July 17, 1998, 2187 U.N.T.S. 90. The crime is defined as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." *Id.*

36. *See* Velásquez Rodríguez Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 1, at ¶ 29 (June 26, 1987) (stating, "[i]n exercising these powers, the Court is not bound by what the Commission may have previously decided; rather its authority to render judgment is in no way restricted. The Court does not act as a court of review, of appeal or other similar court in its dealings with the Commission").

37. *See* Court's Rules of Procedure, *supra* note 16, at art. 42.

38. *See* Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, at ¶ 59 (July

defining the exhaustion of local remedies, the *Velásquez Rodríguez* Court also set forth the criteria for the interpretation of "effective remedies," pursuant to Article 25 of the American Convention regarding the right of access to justice.[39]

Second, the Court defined the standard of proof required in disappearance cases. As the lack of forensic evidence makes it difficult to prove disappearances, the Court held that, in some instances, disappearances could be proven by circumstantial evidence and logical inference.[40] Before it would allow circumstantial evidence, the Court required the Commission to establish, by satisfying a high standard of proof, that there was a pattern of disappearances.[41] The Commission had to demonstrate a pattern of disappearances and link an individual case to the pattern by circumstantial evidence. Then, the burden of proof would shift to the State to demonstrate that it was not responsible for the disappearance.[42]

Had the Court not accepted circumstantial evidence, it would not have been possible to prove state responsibility. An effective legal system requires that the State and its organs will investigate crimes and punish those responsible. If, on the contrary, a State and its organs, are responsible for committing the crimes, State officials will likely refuse to cooperate and they will actively engage in a cover-up with all of the resources at their disposal, making it practically impossible for an international tribunal to apply a standard of proof such as "beyond a reasonable doubt."[43] Accordingly, the Court's judgment reflected the need for different evidentiary standards in international human rights tribunals as its purpose is to determine state responsibility rather than individual guilt.[44]

Furthermore, the Court in *Velásquez Rodríguez*, for the first time in the Inter-American system, ordered material and non-material damages. In doing so, it did not refer to Honduran domestic law for issues of reparations, but based its decision on international law.[45] In a subsequent interpretation of the reparations sentence, the Court protected the victims against devaluation of the Honduran currency by ordering the payment of reparations in U.S. dollars.

29, 1988); Velásquez Rodríguez Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 1, at ¶ 88 (June 26, 1987).

39. *See* Blake v. Guatemala, 1998 Inter-Am. Ct. H.R. (ser. C) No. 36 (Jan. 24, 1998); Castillo Páez v. Peru, 1997 Inter-Am. Ct. H.R. (ser. C) No. 34, at ¶ 90 (Nov. 3, 1997).

40. *See* Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, at ¶¶ 124–126 (July 29, 1988).

41. *Id.*

42. The Court allows circumstantial evidence in disappearances cases because "this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim." *See id.* at ¶ 131.

43. *Id.* at ¶¶ 135–136.

44. *See id.* at ¶¶ 129–134.

45. *See* Mendez & Vivanco, *supra* note 28, at 568. In contrast, the European Court of Human Rights regularly looks to domestic law for issues of reparations under Article 50 of the European Convention on Human Rights. Notably, the Inter-American Court does have flexibility to refer the case to domestic procedures for reparations due to the nature of the issue before it such as the complex economic issues it faced in the *Five Pensioners v. Peru*. *See* 2003 Inter. Am. Ct. H.R. (ser. C) No. 98, ¶ 178 (Feb. 28, 2003). *See also* SERGIO GARCÍA RAMÍREZ, LA JURISDICCIÓN INTERAMERICANA DE DERECHOS HUMANOS, 188, 203 (2006).

While the Commission and the victim's lawyers also sought symbolic forms of redress, the Court rejected their claim.[46] In numerous cases since *Velásquez Rodríguez*, however, the Court has ordered States to make reparations that have symbolic significance, such as building monuments, publishing the Court's decision in a newspaper, or providing the resources for a proper burial.[47] The Court has also required that States make reparations to a particular community to which the victim belongs by providing services that are otherwise lacking, so as to prevent future violations.[48]

In summary, the *Velásquez Rodríguez* case contributed to the evolution of human rights norms by exposing and delegitimizing the inhumane practice of disappearances. It demonstrated that individuals unwilling to accept the state practice of forced disappearances should be entitled to bring their claims to international bodies. Further building on its decision, the Court has since noted that family members of the disappeared are often themselves direct victims of cruel, inhuman, and degrading treatment because they have been denied access to justice and have lived with the uncertainty of not knowing the whereabouts of their loved ones.[49] The case also contributed to the depoliticization of the human rights discourse in the hemisphere. By framing the issue in terms of human rights abuses and not politics, the case reinforced the idea that human rights apply regardless of the political context or the regime in power. By following a judicial process based on a treaty, and issuing an impartial decision grounded in the rule of law, the Court circumvented sovereignty concerns and the politics that generally accompanied human rights discussions in the hemisphere.

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46. *See* Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, at ¶¶ 194 (July 29, 1988); Velásquez Rodríguez Case, Compensatory Damages Judgment, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7 (July 21, 1989).

47. *See* The "Street Children" (Villagrán-Morales) v. Guatemala, 2001 Inter-Am. Ct. H.R. (ser. C) No. 77, at ¶¶ 6, 7 (May 26, 2001) (requiring that Guatemala provide the resources for a proper burial for one of the victims, and designate an educational center with a plaque dedicated to the victims); Barrios Altos v. Peru, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001) (ordering the State to provide the beneficiaries with educational benefits including scholarships, classroom materials, and uniforms, and to erect a monument commemorating the victims within 60 days of the signing of an agreement between the Commission and the State).

48. *See* Fermín Ramírez v. Guatemala, 2005 Inter-Am. Ct. H.R. (ser. C) No. 126, at ¶ 138.12 (June 20, 2005) (ordering Guatemala to improve detention conditions to conform with international standards); Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, at ¶ 221 (June 17, 2005) (requiring the State to provide clean water and medical care for an indigenous community while the community is without their own land); Aloeboeteo v. Suriname, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15 at ¶ 116.5 (Sept. 10, 1993) (ordering the opening of a school and pharmacy for the community as part of the reparations); *see also* CENTER FOR JUSTICE AND INTERNATIONAL LAW, GACETA: LAS REPARACIONES EN EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS, No. 22 (2004), *available at* http://www.cejil.org/gacetas/22Gaceta%20Rep%20final.pdf.

49. *See* 19 Merchants v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, at ¶ 229 (July 5, 2004); Juan Humberto Sánchez v. Honduras, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, at ¶ 101 (June 7, 2003); Blake v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 48, at ¶ 38 (Jan. 22, 1999); Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, at ¶ 160 (Nov. 25, 2000).

II. THE CASE OF *BARRIOS ALTOS V. PERU*

The case of *Barrios Altos* involves extrajudicial killings in the context of Peru's fight against terrorism. The analysis of the case is particularly significant because it addresses amnesty laws enacted by the Peruvian government for the purposes of preventing investigation of crimes and protecting human rights violators.

The facts that led to this case occurred on November 3, 1991, when six armed members of the military entered a building in the Barrios Altos neighborhood in Lima, Peru, while the victims were having a fundraising party. The armed group ordered everyone to drop to the floor and opened fire indiscriminately.[50] As a result, fifteen people were killed and another four were injured. The incident was linked to the "Grupo Colina," a division within the Peruvian army that acted as a death squad in the fight against terrorism. Information gathered later from different sources suggested that prior to this incident there were a series of terrorist attacks attributed to Sendero Luminoso (the Shining Path) that could have triggered the military attack. The validity of these claims, however, was never proven before the Inter-American Court.

Although the events occurred in 1991, the first judicial investigation into the incident did not occur until 1995. This investigation was suspended after the Peruvian Congress issued law No. 26479, which "exonerated members of the army, police forces and also civilians who had violated human rights or taken part in such violations from 1980 to 1995 from responsibility."[51]

After several attacks on the constitutionality of the amnesty laws, fearing that a judicial decision striking down the laws was forthcoming, the Peruvian Congress passed law No. 26492, "directed at interfering with legal action in the *Barrios Altos* case," adding that the amnesty law could not be reviewed by any judicial authority. Consequently, judicial actions challenging the constitutionality of the amnesty laws in question were abandoned and any pending investigations were closed.

The case was brought before the Inter-American system in 1995. Peru's first response to the case was to defend the amnesty laws, claiming that they were exceptional measures adopted based on the urgent need to fight terrorism in the country. The Commission rejected this argument, and on June 8, 2000, the Commission filed a petition with the Court in light of Peru's refusal to investigate the claims and compensate the victims.

A. The Decision

In the proceedings before the Court, the Peruvian government, after unsuccessfully trying to withdraw its recognition of the Court's contentious jurisdiction, recognized its international responsibility in the case for the violations of Articles 4 (right to life), 5 (right to personal integrity), 8 (right to due process), and 25 (access to justice) of the American Convention. The Court additionally declared that Articles 1 and 2 of the Convention had been violated. The Court expanded on the incompatibility of amnesty laws with the Convention, stating that

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50. *See* Case of Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75, at ¶ 2(b) (March 14, 2001).

51. *Id.* at ¶ 2(i).

> [t]his Court considers that all amnesty provisions, provisions on prescription and establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary executions and forced disappearances, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[52]

Furthermore, the Court added that "self amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention."[53]

B. The Importance of the Case for the Court and the International Community

The Inter-American Court's rejection of amnesty laws as "manifestly inconsistent" with the Convention has had significant effects in the region, especially in the Chilean and Argentinean contexts. In 2005, Argentina's Supreme Court ruled on the unconstitutionality of amnesty and pardon laws based on Inter-American law and jurisprudence. In Chile, the courts adopted the theory of "the continuing crime" ("delito continuado") as a way to exclude the application of amnesty laws, in a context where the latter had been declared in violation of the Inter-American human rights norms.

The jurisprudence of the Inter-American system on this issue has also had a broader impact given the pervasiveness of impunity in the region, which shields offenders from investigation and punishment either through the adoption of amnesty laws or de facto measures. Impunity is indivisible: it pervades the legal system as a whole, sending the message that even the most abhorrent crimes can be shielded from investigation or punishment. Accordingly, impunity encourages corruption and conspires against security and social welfare. In rejecting amnesty laws, the Court also upheld the duty to investigate and punish human rights violations, as stated in Article 1.1 of the American Convention. The Court's decision indicated the individuals need to live in a system that secures and guarantees protection of their internationally-protected rights. Impunity directly prevents fulfillment of that State obligation.

III. THE CASE OF *AWAS TINGNI V. NICARAGUA*

The Awas Tingni, an indigenous community of approximately 630 individuals, have inhabited land on the Atlantic coast of Nicaragua for generations. That land is rich in timber and other natural resources. For more than one half of a century, the tribe has requested that the government demarcate their land. Nonetheless, to date, Nicaragua has failed to do so.

The concerns of the community regarding land titling and demarcation intensified when the government of Nicaragua granted Maderas y Derivados de Nicaragua S.A. (MADENSA), a Dominican company, permission to enter the Awas Tingni's lands and inventory the tropical forest resources in preparation for large-scale logging. In

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52. *Id.* at ¶ 41.
53. *Id.* at ¶ 43.

December 1993, a concession for logging on approximately 43,000 hectares of land was finalized. At the time, the World Wildlife Fund and the University of Iowa College of Law assisted the Awas Tingni community in negotiations with the government and MADENSA. As a result, an agreement was signed in May 1994, providing for economic benefits for the community. Additionally, the government committed itself to commence the process of identifying, demarcating and titling the lands.

The government's commitment to this process proved illusory, as it was already engaged in discussions with Sol del Caribe (SOLCARSA), another logging company from South Korea, in a similar project. When SOLCARSA won the concession to log Awas Tingni land, the community decided to take legal action, both domestically and internationally.

After several attempts, the community managed to get SOLCARSA's concession revoked in domestic courts. However, the titling and demarcation of the community lands were still pending. The lack of government cooperation in this regard and its failure to comply with the Commission's recommendations guaranteed the Commission bringing the case to the Inter-American Court. The petition requested that the Court order Nicaragua to establish and implement a procedure that would result in the prompt demarcation and specific recognition of Awas Tingni's communal lands, and to provide monetary compensation to the Awas Tingni for the infringement of their property rights.

A. The Decision

The Court's proceedings illustrated the fundamental difference between the government's and the indigenous people's views about the ownership of land and resources. The Nicaraguan government advanced the traditional paradigm of state "dominance over territory, a perspective in which is absent a desire to understand accurately and fully the dimensions and significance of the indigenous presence,"[54] while the Awas Tingni stressed communal ownership of the land based on their traditional fishing and hunting use since time immemorial.

In the end, the Court accepted the Awas Tingni's claim and ruled that the community was entitled to the recognition of property rights over their lands. The Court found that Nicaragua had failed to guarantee the rights expressly recognized in its constitution and legislation, and that there were no adequate and effective remedies for indigenous peoples to claim such rights in the domestic arena. The Court thus found that the failure to implement the rights expressly granted by a State's domestic legal order constituted a violation to the American Convention.

Additionally, the Court found a violation of the right to property set forth in Article 21 of the Convention. In its analysis of Article 21 the Court further found, inter alia, that: 1) there is a right to communal property; and 2) indigenous peoples are entitled to their traditional lands based on their use (e.g., fishing and hunting) since time

54. S. James Anaya & Claudio M. Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ.J. INT'L & COMP. L. 1, 11 (2002).

immemorial. For the Court a narrower conception of rights in domestic law did not trump broader treaty obligation.[55] According to the Court

> Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention -which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.[56]

B. The Importance of the Case for the Court and the International Community

The Court stressed that "the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival."[57] It concluded that "[a]s a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration."[58]

The Court's decision in the case of the Awas Tingni community was the first international decision to recognize the right to communal property. It was also the first international decision to recognize indigenous law and custom as sources of enforceable rights and obligations. The Court in this case reiterated the right of indigenous peoples to live freely within their territory, and acknowledged their legal, cultural, and social differences, respecting and embracing them. Since the decision in the *Awas Tingni* case, several cases before the Court have recognized the special character of indigenous populations and their collective rights based on the American Convention. In addition, the social exclusion of indigenous peoples—including the relatively high percentages of illiteracy and poverty in comparison to the rest of society—has led to the Commission's creation of a Special Rapporteur on the Rights of Indigenous Peoples. The purpose of that position is to promote the recognition of the rights of indigenous groups by setting standards and initiating cases before the Inter-American organs.[59]

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55. Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

56. *Id.* at ¶ 148.

57. *Id.* at ¶ 149.

58. *Id* at ¶ 151.

59. *See, e.g.*, Case of the Saramaka People. v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172 (2007); Case of the Yakye Axa Indigenous Community v. Paraguay (Interpretation of the Judgment), Inter-Am. Ct. H.R. (ser. C) No. 142 (2006); Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 146 (2006); Case of the Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125 (2005); Case of Yatama v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 127 (2005); Case of the Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 105 (2004); Inter-Am. C.H.R., Annual Report, OEA/Ser.L/V/II.130, doc. 22, ch. 2, at paras. 55–63 (Dec. 29, 2007).

IV. REFLECTIONS ON THE FUTURE OF THE INTER-AMERICAN SYSTEM

Since the *Velásquez Rodríguez* decision eighteen years ago, drastic political changes have taken place in the Americas. The Inter-American system has contributed to these changes by protecting human rights and democratic values, offering a voice to victims, and upholding the legitimacy of human rights norms. In addition, the Inter-American Commission and Court have contributed in numerous ways to the protection and promotion of human rights and democracy, by saving lives, authoritatively reporting violations, and administering justice when domestic remedies fail to bring relief to the victims. The individual petition mechanism serves as an early warning system since, when new violations begin to emerge, they are brought to the attention of the political organs of the OAS as well as the public. While it is difficult to quantify its impact, the Inter-American system for the protection of human rights certainly has been a factor in the transformation of the region by supporting the efforts of democratic actors.

Currently, 34 of the 35 countries in the Western Hemisphere have elected governments. Societies in the hemisphere are more open, with greater civil society participation than in previous decades. Nonetheless, serious problems remain: judiciaries are not perceived as fair; congresses do not hold powerful executives accountable through checks and balances; and poverty and exclusion conspire against democracy and participation.

Argentine social scientist Guillermo O'Donnell discusses the phenomenon of "delegative democracies," where a charismatic figure assumes the presidency after relatively free elections, and then governs without the traditional counterweights normally associated with a representative democracy.[60] Inherent in such "delegative democracies" is a risk of backsliding into authoritarianism. "Charismatic leaders" concentrate powers and adapt the constitutional legal system to perpetuate their "leadership."

To confront this situation, it is crucial to strengthen democracy by improving institutions of democratic governance, encouraging civil society participation, and emphasizing the value of democratic ideas. The Inter-American human rights system can play an important role in this process, as it has at other difficult moments in the history of the region. In fact, it is widely perceived as the most successful and participatory endeavor of an otherwise weak organization.[61] The dramatic increase in decisions adopted by the Inter-American human rights organs attests to the growing relevance of the system. For example, the Commission received 571 petitions in 1998, while in 2005 it received 1330.[62] That same year, the Commission opened 150 new cases, and had 1137 cases and petitions pending.[63]

In 1986, the Court had 3 contentious cases in process. By 2005, the number of contentious cases before the Court and in various stages of supervision had climbed to

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60. Guillermo O'Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55, 56 (1994).

61. *See* The Inter-American Dialogue Task Force on the Organization of American States, *Responding to the Hemisphere's Political Challenges*, at 18 (June 2006), *available at* http://www.thedialogue.org/PublicationFiles/OAS_2006.pdf.

62. Inter-Am. C.H.R., Annual Report, OEA/Ser.L/V/II.124, doc. 5, ch. 3, at ¶ 8 (2006) [hereinafter Court's Annual Report 2005].

63. *Id.* at ¶ 8.2.

74.[64] In 1987, the Court issued one judgment and no pronouncements on preliminary objections, merits or reparations. In 2005, the Court issued judgments in 14 cases and pronouncements on preliminary objections, merits or reparations in 29 cases.[65] The number of provisional measures ordered by the Court has likewise dramatically increased.[66] In 1980, the Court held 38 days of sessions; by 2005 that number had almost doubled. That year, the Court held 69 days of sessions, divided between four regular and one special session.[67] In 27.9% of the cases, States have acknowledged their international responsibility, either completely or in part.[68] During the 1980s, the average case before the Court lasted 39 months; since the adoption of new Rules of Procedure in 2000, processing time for cases has been reduced to an average of 21 months.[69]

For the system to realize its full potential, however, much more needs to be achieved. Some issues to be addressed concern much needed procedural improvements and, in many instances, the required changes can be achieved by the supervisory organs themselves. For example, under *Velásquez Rodríguez*, the Court defined itself as a "trial court." As effective as it was at the time, this meant that every case had to be proven twice: once before the Commission, and then again before the Court. This increased the expense of the proceedings because witnesses had to be brought before both tribunals. It also made the process less accurate since opportunities were lost as time elapsed and witnesses could not always clearly remember underlying events. Additionally, trying every case anew by the Court sends the message that the member states need not cooperate with the proceedings before the Commission, thereby greatly weakening the Commission's role.

These concerns led to the adoption of new Rules of Procedure in November 2000, whereby the Court, while retaining its right to "retry" a case, may give probative value to the Commission's proceedings if, in the Court's judgment, those proceedings satisfy

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64. *Id.* at ¶ 8.6.

65. *Id.* at 66.

66. *Id.* at 76–77. In 1988, the Court ordered the State to adopt provisional measures in three cases. In 2004 provisional measures were ordered in 34 cases, and in 36 cases in 2005. Provisional measures may include providing cell phones and bodyguards to protect the lives and personal integrity of individuals receiving death threats. *Id.*

67. *Id.* at 59. Recently, the Court has held special sessions in other countries, such as Brazil, Argentina, and El Salvador. Annual Report 2005, Inter-Am. Court H.R. (ser. C) No. 69, at 59 (Dec. 2, 2005).

68. *Id.* at 63 (listing the cases that have accepted responsibility); *see, e.g.*, Mapiripan Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005); Gutierrez Soler v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132 (Sept. 12, 2005); Huilca Tecse v. Peru, 2005 Inter-Am. Ct. H.R. (ser. C) No. 121 (Mar. 3, 2005); Plan de Sanchez Massacre v. Guatemala, 2004 Inter-Am. Ct. H.R. (ser. C) No. 105 (Apr. 29, 2004); Maritza Urrutia v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 103 (Nov. 27, 2003); Myrna Mack Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003); Bulacio v. Argentina, 2003 Inter-Am. Ct. H.R. (ser. C) No. 100 (Sept. 18, 2003); Barrios Altos v. Peru, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001); Aloeboeteo v. Suriname, 1991 Inter-Am. Ct. H.R. (ser. C) No. 11 (Dec. 4, 1991).

69. *See* Court's Annual Report 2005, *supra* note 62, at 72; *see also* Antônio Augusto Cançado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. INT'L & COMP. L. 5, 21 (2000).

the necessary standards.[70] Still, the issue has yet to be fully resolved to avoid duplication of efforts and achieve procedural economy that would, in turn, further shorten the trial and decision periods.

Access to the system is not guaranteed given the increasingly high litigation expenses in Washington DC and Costa Rica, where the system's main supervisory organs sit. Additionally, the Commission doesn't have a transparent system to grant hearings, admit cases for processing or follow up initiated submissions. Equally, there are currently no deadlines for the Commission to review the admissibility or merits of any given case. As a result, petitioners often do not know the procedural status of their claims which, in turn, affects their opportunity to be competently and timely represented.

The legitimacy of the system has brought about a significant increase in the number of cases filed annually, as mentioned above. This increase has created a backlog and delay in the resolution of cases which must be promptly addressed. Notwithstanding the importance of the Court's docket issues and internal governance issues, the crucial obstacle impairing the system is the lack of material and political resources accorded to it. The Commission and Court each meet a few times per year for a few weeks each time. The commissioners and judges are not full-time employees. For a hemisphere of approximately 800 million individuals, the Commission has only 24 full-time lawyers and the Court nine. This failure by the OAS to allocate sufficient resources is demonstrative of a dearth of political will.

The OAS General Assembly has been reluctant to exercise its role as political guarantor of the system. With the adoption of the Democratic Charter in 2001, the organization acquired additional tools to enforce human rights protections and ensure compliance with Inter-American decisions. Through the Charter, the member states reaffirmed their will to strengthen the human rights protection and democratic values. This is reflected in sections IV and V of the Charter which encompass Article 20, reading, in part:

> In the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, any member state or the Secretary General may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate.[71]

Although violations of human rights create a basis for action by the political organs of the OAS, they have not yet fully exercised this possibility. Is it a lack of democratic solidarity? Is it easier to confront dictatorships than the shortcomings of democracy? Is it the fact that while all of the countries in the Western Hemisphere belong to the Inter-American system, not all of them have ratified the American Convention, most notably, Canada and the United States? Regardless of what the reason may be, without

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70. Rules of Procedure of the Inter-American Court of Human Rights, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev.9 (2003).

71. Inter-American Democratic Charter, OAS Doc. OEA/SerP/AG/Res.1 (September 11, 2001).

the system being accorded the material and political support that it needs, it will not be able to realize its full potential.

CONCLUSION

The Inter-American system has contributed significantly to the development of human rights in the region as well as to broader democratic values. The cases of *Velásquez Rodríguez*, *Barrios Altos* and *Awas Tingni* illustrate the contribution and impact of the system's decisions in confronting mass and gross violations of human rights under dictatorships, addressing their legacy and, most recently, seeking to strengthen fledgling democracies by promoting inclusion and rejecting a backslide to authoritarianism.

Still, the system continues to face new challenges, as previously identified: issues of inclusion and poverty, economic, social and cultural rights, and new challenges to democracy in the region. For the system to realize its full potential, it is imperative to strengthen it by allocating sufficient resources and effectively demonstrating a collective political will to act in cases of human rights violations. To achieve those goals, today, as in the past, the power of the hemispheric common narrative of human rights as embodied in the Inter-American system is essential as it stresses shared values and joint responsibility where violations have occurred. The link between human rights and democracy is also fundamental, as democracy offers the best vehicle for the improvement of societies and for the protection and promotion of human rights.

In the context of hemispheric transition to democracy, the Inter-American system has played a role as a crucial domain where values of human dignity are protected and promoted. In his *Feast of the Goat*, Mario Vargas Llosa tells the story of a politician who, in an attempt to win back the favor of the Dominican dictator Trujillo, offered his own daughter to be raped by the dictator.[72] What is most striking from that story is the way in which the events apparently took place: a distorted reality where it appeared natural (as it did to that politician) that one would offer his own daughter to be raped. When analyzing the role of literature, award-winning author Milan Kundera opines that its purpose is to show hidden aspects of reality through imagination. Through the human rights narrative, the Inter-American system plays a similar role by exposing violations of fundamental rights that went unpunished in the domestic realm. In fact, the Inter-American is a domain where, through the acts of individuals, commissioners, judges, and lawyers, human rights and common sense continue to be resilient and valid even in times of distorted realities. By performing that role, the system has encouraged those who seek the full realization of human rights and has exposed alienation. The strengthening of the system will enable investigation and punishment of violations that have already taken place, but it will also expand the opportunities to prevent violations before they occur.

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72. M. VARGAS LLOSA, THE FEAST OF THE GOAT (2001).